

Harmonization of Labour Laws in ASEAN - Measures to Protect Migrant Workers

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Abstract

Globalization and regional integration have become unavoidable forces in the world, driving the expansion and advancement of national economies. With the growth of economic markets, cross-border labour movements are on the rise. The movement of labour, particularly in the Southeast Asian region, has been instrumental in overall economic growth. This process has significantly impacted ASEAN economies, leading them to consider harmonizing labour laws in line with international standards. Cross-border labour migration has helped balance labour supply and demand, benefiting both sending and receiving countries. However, safeguarding the rights of migrant workers based on international standards, particularly those set by the International Labor Organization, remains a significant challenge in ASEAN countries. This paper examines the need for harmonization of labour laws in ASEAN, aiming to enable countries to implement policies that uphold the rights of migrant workers and align with International Labor Organization standards.

Keywords: Harmonization of Labour Laws, ASEAN, ILO, Migrant Workers

I. Introduction

Founded in 1919, the International Labour Organization (ILO) has been a specialised agency of the UN since 1946. It is devoted to promoting humane work conditions, labour rights, and other internationally recognized human rights, and it pursues its founding mission that labour peace is essential to the prosperity of all classes, sections and groups. Today, the ILO helps advance the creation of a decent work environment, working people at a stake in lasting peace, prosperity

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and progress.² The ILO's primary goal is promoting social justice and globally acknowledged labour and human rights. The ILO, the only tripartite organization in the United Nations, brings together representatives of 187 Member States' governments, businesses, and labour unions to set labour standards, formulate laws, and implement initiatives that advance decent work for both men and women. Since its inception, the ILO has also introduced many International Conventions aiming to safeguard and enhance the human rights of migrant workers³, with particular emphasis on the core Conventions addressing basic labour rights for migrant workers who live in host countries, often face human rights violation and denial of basic facilities⁴. Many countries have adopted these core Conventions and integrated them into their respective policies and laws⁵.

While the International Labour Organization (ILO) has made significant strides in implementing its resolutions and conventions across numerous countries, it's important to acknowledge that a limited number of countries have ratified these conventions worldwide. Additionally, within the ASEAN region, the adoption and implementation of these conventions face several challenges, particularly in light of increasing migration concerns and the limitations posed by the Convention on the country of destination. Addressing these challenges will be

² The International Labour Organization (ILO) was established in 1919 as part of the Treaty of Versailles following the end of World War I. The organization has played a significant role in historical events such as the Great Depression, decolonization, the creation of Solidarność in Poland, and the victory over apartheid in South Africa. Today, it continues to work towards building an ethical and productive framework for fair globalization. In 1946, the ILO became a specialized agency of the United Nations. Its unique tripartite structure ensures an equal voice for workers, employers, and governments, providing a platform to promote decent work for all men and women.

³ "Migrant Worker" is defined in the International Labour Organization (ILO) charter as an individual who migrates from one country to another (or who has migrated from one city to another) with a view to being employed other than on his own account, and includes any person regularly admitted as a migrant for employment. Please see, ILO background note: http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_220084.pdf

⁴ Benjamin Harkins; Daniel Lindgren; and Tarinee Suravoranon, *Risks and Outcomes: The Impact of Labour Migration in Southeast Asia - Key Findings from Vietnam*, ILO-IOM 3-4 (2017)

⁵ Ronald C. Brown, *ASEAN: Harmonizing Labor Standards for Global Integration*, *PACIFIC BASIN LAW JOURNAL* 35, (2016)

crucial for ensuring the effective implementation of ILO standards in the region⁶. The ASEAN, founded in 1967, has become a crucial economic force in the Asia-Pacific region, with 10 member countries. It is also a vital partner in the regional strategies of major global powers⁷. The ASEAN member states are the source of international migrants but also important destinations for migrants within the region. Southeast Asia is a prominent region globally in terms of inter-country migration. Migration continues to increase in ASEAN countries despite declining rates of internal migration in most other regions⁸.

In Southeast Asia, people prefer to migrate to Thailand for employment in manufacturing, construction, domestic work, and agriculture from Cambodia, Laos, and Myanmar. Malaysia is an ideal destination for Indonesian migrants seeking domestic and agricultural labour. In the meantime, many Malaysians travel daily over the Straits of Johor to work, and many of them travel to Singapore in search of employment⁹. Only a few developing nations have emerged as popular migration hubs: Malaysia and Thailand. Malaysia (another major destination) and the Philippines (one of the largest sources of migrants) have very complex immigration management mechanisms. Migration within the region has increased due to the ASEAN Economic Community program, which began in 2015 and aims to encourage the free movement of skilled and professional workers within the region.¹⁰ Wage disparities within countries and between sending and receiving countries have attracted migration¹¹. Remittances sent by migrant workers to their home countries help improve their families' lives and reduce poverty. Migrant workers also bring back capital, knowledge, and

⁶ ASEAN, *Women Migrant Workers in the Laws and Policies of ASEAN Member States*, 7 (2022).

⁷ General Statistics Office of Vietnam, *Socio-economic data of Southeast Asian countries in the period 2000-2020*, (2022).

⁸ Mauro Testaverde, Harry Moroz, Claire H. Hollweg, Achim Schmillen, *Migrating for opportunity. Overcoming Barriers to Labor Mobility in Southeast Asia*, WORLD BANK 1-3 (2017).

⁹*Id.* at 5.

¹⁰ Jasmine Chia and Yonh Han Poh, *Amid COVID-19 Crisis, Southeast Asia's Migrant Workers Fall Through the Crack*, THE DIPLOMAT, Dt 31/03/2020; <https://thediplomat.com/2020/03/amid-covid-19-crisis-southeast-asias-migrant-workers-fall-through-the-cracks/>

¹¹ Testaverde, *supra* note 08.

skills when they return home. In receiving countries, migrant workers solve labour market shortages, promote production, and improve competitiveness¹².

Despite their important role, due to inappropriate policies and ineffective general management institutions in managing migrant workers, they have not yet fully exploited the opportunities available¹³. It's an undisputed fact that implementing international or regional commitments related to labour mobility within the nation is a tough task, and merely a few nations have shown a willingness to adopt international labour standards in their domestic jurisdiction¹⁴. As a result, ensuring social security, minimum wages, and decent working conditions for the working population remains a challenging goal in many Southeast Asian countries such as Malaysia, Thailand, Vietnam, Cambodia, and Indonesia¹⁵. The main thrust of the present analysis is to emphasize the role of labour mobility in ASEAN and the ILO core labour standards for countries. It also delves into the uneven participation of countries in ILO core labour conventions, especially the Convention on the Rights of All Migrant Workers and Members of Their Families (1990 Convention). One of the measures considered to promote labour mobility and protect the rights of migrant workers is the harmonization of laws, but there are still many difficulties in this process. These difficulties stem from the unique characteristics of ASEAN countries, necessitating systematic and comprehensive policy measures.¹⁶ This analysis underscores the importance of harmonizing labour laws. It provides recommendations to promote and enhance the rights of migrant workers, thereby aiding in the further development of ASEAN's socio-economy.

¹² Philip Martin & Manolo Abella, *Reaping the Economic and Social Benefits of Labour Mobility: ASEAN 2015*, P33, Int'l Labour Org. [ILO] (Nov. 19, 2014).

¹³ Testaverde, *supra* note 8 at 9-13.

¹⁴ Brown, *supra* note 5 at 33.

¹⁵ Chia, *supra* note 10.

¹⁶ Thi Hong Nguyen, *Challenges in Ensuring the Rights of Vietnamese Migrant Workers in the Globalization Context – The Two Sides of the Development Process 25 ASIAN YEAR BOOK OF INTERNATIONAL LAW* 154 (2019).

II. ILO core Labour Standards¹⁷ for Migrant Workers - ASEAN Regional Analysis

The ILO has played a significant role in historical events and today continues to work to build an ethical and effective framework for a just globalization¹⁸. Its unique tripartite structure ensures an equal voice for workers, employers and governments, providing a platform for promoting decent work for all men and women. The ILO promotes decent working conditions, protection of labour rights and social security for all workers, regardless of their nationality and identity¹⁹. This includes migrant workers and any person who is regularly recognized as a migrant for work, those in the formal economy and the casual workforce in the informal economy, particularly in the Asia and Southeast Asia regions.

For the purposes of this article, when referring to migrant workers, I mean international migrant workers or migrant workers. “Migrant worker” refers to a person who has been, is or will be engaged in a remunerated activity in a country of which he or she is not a national²⁰. According to the ILO report, the number of migrant workers, international migrants for work, has skyrocketed from 164 million to 169 million from 2017 to 2019²¹. This increase represents nearly 70% of the total number of working-age migrants who make significant contributions to vital jobs, economic growth and recovery worldwide. To ensure that migration positively impacts development, it is essential to ensure decent working conditions, fair wages, access to health facilities and other social protection measures. The ILO protects labour rights and labour market dynamics linked to the rights of migrant workers. Effective migration management systems and legal regulation of employment relationships are essential to ensure productive and sustainable employment through labour migration workers’ employment

¹⁷ *Guide to International Labour Standards and Rights at Work concerning Young People*, INTERNATIONAL LABOUR STANDARD DEPARTMENT 12 (2018).

¹⁸ *100 International Labour Conferences*, INTERNATIONAL LABOUR ORGANIZATION <https://www.ilo.org/international-labour-conference/history>.

¹⁹ *Guide to International Labor Standard*, *supra* note 17.

²⁰ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 1990.

²¹ *Report of the International Labor Organization*, ILO, 2021, <https://www.ilo.org/vi/resource/news/lao-dong-di-cu-toan-cau-tang-them-nam-trieu-nguoi>.

relationships must be properly formalized and managed, with their rights protected by law.

In addition to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (called the 1990 Convention) which specifically regulates migrant workers, there are 8 fundamental ILO Conventions, covering topics considered to be fundamental principles and rights in labour as follows:

- Convention No. 87 on freedom of association and protection of the right to organize (1948).
- Convention No. 98 on the application of the principles of the right to organize and to bargain collectively (1949).
- Convention No. 29 on forced or compulsory labour (1930).
- Convention No. 105 on the abolition of forced labour (1957).
- Convention No. 100 on equal remuneration for men and women workers for work of equal value (1951).
- Convention No. 111 on Discrimination in Employment and Occupation (1958).
- Convention No. 138 on Minimum Age for Admission to Employment (1973).
- Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999).

In addition, the principles of worker protection are also reflected in the ILO Declaration on Fundamental Principles and Rights at Work (1998)²². According to the ILO Declaration, all ILO members, whether or not they have ratified the above fundamental conventions, must respect, promote and implement the principles and rights contained in these Conventions. ILO convention standards can help to establish a practical agenda for national and regional labour law coordination, if not harmonization, within ASEAN. Ten ASEAN countries have

²² The ILO Declaration of Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2002, is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values -values that are vital to our social and economic lives, Available at <https://www.ilo.org/ilo-declaration-fundamental-principles-and-rights-work>.

ratified/joined some core conventions but at different time periods²³. This shows that the level of acceptance and readiness for integration of countries is different, which also means that the rights of migrant workers in each ASEAN country are different.

Table 1: Status of participation/ratification of ILO fundamental conventions in ASEAN

Conventions ----- Nation	No 87	No 98	No 29	No 105	No 100	No 111	No 138	No 182	No 1990
Brunei							6/11/11	6/9/08	
Cambodia	8/23/99	8/23/99	2/24/69	8/23/99	8/23/99	8/23/99	8/23/99	3/14/06	9/27/04
Indonesia	6/9/98	7/15/57	6/12/50	6/7/99	8/11/58	6/7/99	6/7/99	3/28/00	9/22/04
Laos			1/23/64		6/13/08	6/13/08	6/13/05	6/13/05	
Malaysia		6/5/61	11/1/57	10/13/58	9/9/97		9/9/97	11/10/00	
Myanmar	3/4/55		3/4/55					12/18/14	
Philippines	12/29/53	12/29/53	7/15/05	11/17/60	12/29/53	11/17/60	4/6/98	11/28/00	11/15/93
Singapore		10/25/65	10/25/65	10/25/65	5/30/02		11/7/05	6/14/01	
Thailand			2/6/69	12/2/69	2/8/99		5/11/04	6/16/01	
VietNam		6/2019	3/5/07	5/2020	10/7/97	10/7/97	6/24/03	12/19/00	

According to the table above, Brunei is the country with the fewest ratifications of the Conventions. Brunei has only ratified conventions that discuss the abolition of child labour. Cambodia, Indonesia and the Philippines have ratified all nine of the ILO labour conventions listed above. The abolition of child labour, ILO Convention No. 182, is the only convention ratified by all 10 countries. The next most common core labour provisions are the elimination of forced and compulsory labour, ratified by most countries through either Convention No. 29 or No. 105, with the exception of Brunei which has not ratified either of these conventions. The third most commonly ratified provision is the ILO labour standard calling for eliminating discrimination with respect to employment and occupation. However, Brunei and Myanmar have not ratified the standard through Conventions 100 and 111, while Malaysia, Singapore and Thailand have ratified 100 but not 111. Finally, freedom of association and collective bargaining

²³ Brown, *supra* note 05. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en.

are the least ratified conventions. Convention 87 has only been ratified by Cambodia, Indonesia, Myanmar and the Philippines, while Cambodia, Indonesia, Malaysia, the Philippines, Singapore and Vietnam have ratified Convention 98²⁴.

In the system of international documents on migrant workers, the International Convention on the Rights of All Migrant Workers and Members of Their Families is considered one of the most important treaties²⁵. The Convention is highly practical not only in recognizing and taking into account the diversity of origins and status of migrant workers but also focusing on rights related to aspects that migrant workers often encounter difficulties (the rights of “troubled migrants”). The Convention is highly humane but it imposes many responsibilities, especially economic and social ones, on the receiving countries, causing these countries to hesitate²⁶. This can be seen through examining the composition of the member countries of the United Nations Convention on the Rights of Migrant Workers. It can be seen that among the ASEAN countries that have signed and joined this Convention, there are no countries that receive many workers such as Singapore, Malaysia, Myanmar, Thailand and even Vietnam. Most of the countries that have signed and joined the Convention are the countries that mainly send workers to work abroad (Cambodia, Philippines, Indonesia). The refusal of receiving countries to participate has limited the effectiveness of the conventions on migrant workers in practice²⁷. Promoting the participation of receiving countries in the above Convention is very important in both theory and practice, contributing to the economic development of countries in the ASEAN region.

III. Challenges of labour mobility in the ASEAN integration process

The Association of Southeast Asian Nations (ASEAN), an economic, cultural and social organization of countries in the Southeast Asian region, includes 10

²⁴ Brown, *supra* note 5 at 35.

²⁵ This Convention was adopted by the United Nations General Assembly on December 18, 1990 under Resolution 45/158, effective from July 1, 2003.

²⁶ Although the CMW was introduced more than twenty years ago, so far fewer than fifty countries have ratified it - and the great majority of these countries are predominantly migrant sending rather than migrant receiving, please <https://www.compas.ox.ac.uk/article/the-human-rights-of-migrant-workers-why-do-so-few-countries-care>.

²⁷ *Migrant workers in international law and Vietnam, MONOGRAPH OF THE VIETNAM BAR ASSOCIATION* (2018).

countries: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Currently, ASEAN is the world's 5th largest economy with a GDP of 3,300 billion USD, expected to surpass Germany to reach 4th place by 2030²⁸. ASEAN is home to 615 million people, making it the third largest labour force globally, after China and India. Due to the different levels of economic development among ASEAN Member States (AMS), these countries have different opportunities. As the main driving force for global economic growth, ASEAN's innovative position has been affirmed and increasingly developed, and as a trade hub, it will help boost the regional economy.

The process of joining and integrating into ASEAN brings important and practical benefits to member countries, including a peaceful and stable environment favorable for security and development, enhancing the country's position. The ASEAN Community is formed based on three pillars: the ASEAN Political-Security Community (APSC), the ASEAN Economic Community (AEC) and the ASEAN Socio-Cultural Community (ASCC). ASEAN's foreign relations as well as the goal of narrowing the development gap within ASEAN, especially the "ASEAN Integration Initiative", are integrated into the content of each pillar in the ASEAN Community. Among them, the ASEAN Economic Community (AEC) is considered the most important, aiming to create a single common market and production base, including the free flow of goods, services, investment, capital and skilled labour, thereby enhancing competitiveness and promoting common prosperity for the whole region, creating attractiveness for investment and business from outside²⁹. The development of the AEC is a premise to promote the implementation of the remaining two pillars. The AEC aims at a single market and production base characterized by the free flow of goods, services, investment and skilled labour³⁰. This integration is expected to

²⁸ *ASEAN aims to become world's fourth largest economy by 2030*, VIETNAM Plus, available at <https://en.vietnamplus.vn/asean-aims-to-become-worlds-fourth-largest-economy-by-2030-post291474.vnp>

²⁹ Phan Duc Dung, *Participating in the ASEAN Economic Community (AEC), Opportunities and Challenges for Vietnam in the Context of Joining Trans-Pacific Partnership (TPP)*, 17 *JOURNAL OF DEVELOPMENT AND INTEGRATION* 27 (2014).

³⁰ *Single Market and Production Base*, INVEST IN ASEAN <https://investasean.asean.org/asean-economic-community/view/670/newsid/758/single-market-and-production-base.html>.

improve productivity, competitiveness and economic growth across ASEAN member countries.

The AEC's central mission is to promote equitable economic development and narrow the gap between developed and developing economies in the region. Labour mobility within Southeast Asia has played an important role in the overall economic growth of ASEAN countries in recent years. Cross-border labour migration has helped to adjust the balance of labour supply and demand, benefiting both sending and receiving countries. Receiving countries have gained access to more affordable labour while sending countries have opened up new, more lucrative job markets for their citizens. This mechanism has brought a stable source of finance to the economies of source countries through private remittances. Migrant workers are one of the characteristics of the labour market in Southeast Asia. Migration within the ASEAN is currently on the rise, accounting for one-third of the region's total international migrant workers by 2022³¹. In Southeast Asia, migrant workers - the largest group of migrants globally - are also one of the most vulnerable groups to trafficking. Labour mobility creates flows of migrant workers from one country to another, boosting economic development for both the sending and receiving countries. However, protecting the rights of these workers always faces difficulties from policies, mechanisms, and implementation, leading to impacts on social issues within the ASEAN countries.

Ensuring social security, minimum wages and decent working conditions for working communities remains a challenging goal in many Southeast Asian countries such as Malaysia, Thailand, Vietnam, Cambodia and Indonesia³². Migrant workers, especially those with low skills, face various challenges across countries. Migrant workers are particularly vulnerable, at high risk of physical and mental abuse as well as many challenges during their migration abroad. While working abroad, they often face social stigma and discriminatory attitudes, hindering their access to legal remedies. Those who work informally, through illegal migration or overstay after their legal migration contracts expire, are particularly vulnerable to exploitation, physical violence and mistreatment. Migrant workers are often unorganized and unrepresented, their working

³¹ See <https://nhandan.vn/lao-dong-di-cu-trong-noi-khoi-asean-co-xu-huong-ngay-cang-tang-post724856.html>

³² Brown, *supra* note 5.

conditions are poor, they work long hours, have low productivity and low income. There is a strong link between informality, poverty and social discrimination³³.

Although the AEC has introduced many initiatives to ensure enhanced protection for migrant workers in ASEAN, aiming to transform Southeast Asia into a competitive economic region marked by equitable economic development. However, the development of the AEC and the adoption of global labour standards remain key to its success. The ASEAN Experts Group Meeting held in 2015 highlighted the importance of prioritizing the protection of migrant workers' rights within the AEC framework. However, structural shortcomings in labour policies and practices pose significant challenges to their welfare and protection. One of the key issues facing migrant workers in ASEAN is the prevalence of discriminatory policies and practices³⁴.

These discriminatory policies often limit the rights and opportunities of migrant workers, making them more vulnerable to exploitation and abuse. To address this, there is an urgent need to eliminate discriminatory policies and promote inclusive labour practices across ASEAN member states³⁵.

From 2018 to 2020, the Global Migration Data Analysis Center (GMDAC)³⁶, established in Berlin in September 2015 as part of the International Organization for Migration (IOM), conducted a survey of 84 countries. The survey aimed to assess how migrants can access government-provided health services. The report found that countries provide different levels of access to health services depending on an individual's migration status. One-third of the countries surveyed provided equal access to health care for both citizens and migrants, regardless of their migration status. However, in half of the countries, equal access to health care depends on migration status. About 12% of countries only

³³ ASEAN *Community 2015: Managing Integration for Shared Prosperity and Better Jobs*, ILO-ADB (2014).

³⁴ Mahbubani, Kishore and Jefferey Sng., *The ASEAN Miracle-A Catalyst for Peace*, NUS PRESS, 166 (2017).

³⁵ Nguyen Manh Hai et al., *State-Owned Enterprise Reform in Vietnam: The Contrasting Cases of Vinashin and Viettel*, 41(2) ASIAN PERSPECTIVES 215–237 (2017).

³⁶ The Global Migration Data Analysis Center (GMDAC) is a leading German-based research institute specializing in data analysis related to migration, migrant workers, and human rights issues.

provide migrants with access to some health services, including emergency health care. This is no exception for migrant workers in ASEAN, with many reports, statistics, and surveys on the rights of migrant workers. This stems from the lack of harmonization of policies and laws in ASEAN countries and various barriers arising from institutions, culture, and socio-economic conditions. However, ensuring the rights of workers, especially migrant workers, requires compliance with the ILO's core conventions as well as meeting the expectations of building a united and developed ASEAN.

IV. Potential and barriers to harmonizing labour laws in the ASEAN region

1. Potential for harmonizing laws in ASEAN

Legal harmonization is one of the most important trends in the general development of law in the world. With the process of expanding mutual cooperation in many fields, especially in the field of economic cooperation, law plays an important role and is a factor ensuring "stable connection," so the need for common law is increasingly dominant in international law. Legal harmonization helps countries get closer together in terms of law, contributing to promoting cooperation among countries in the region in political and economic aspects more easily, facilitating the common development of countries in the same community.

In the world, there are regions that have not only succeeded in the policy of legal harmonization from a very early stage, bringing many high practical values, but the highest point these regions have also achieved in the negotiation process is the unification of laws, contributing to a certain success in the common sustainable development of each country in that regional community (EU)³⁷. Of course, with the differences in politics, institutions, laws, and expectations, it is very difficult for countries in the ASEAN region to unify laws like those in the EU region. Harmonization of laws brings benefits in terms of politics, economy and national legal development. For the ASEAN region, promoting harmonization of laws in a number of areas is a necessary step, helping this community become more and more united and stronger.

³⁷*Preparing for increased Labour Mobility in ASEAN: Labour Markets, Immigration Policies and Migrant Rights* IOM (2016).

Firstly, in terms of politics, harmonization of laws contributes to promoting closer political cooperation between countries in the community. Because laws are a management tool of the State, when those management tools have similarities in content, they will determine some similarities in the State management policies of that community, limiting conflicts in the management strategies of the countries. When there are no conflicts between the management policies of each country, it contributes to creating an environment of sustainable and unified political cooperation.

Secondly, in terms of economy, harmonization of laws helps the economies of the countries develop. Harmonization of laws increases the number of formal migrant workers, which benefits the sending country. The use of foreign workers also helps the economy and scientific level of the receiving country to develop. This plays an important role in improving labour productivity and contributing to national competitiveness. For the receiving country, it will add skilled labour to its workforce.

Third, regarding national laws: (i) Harmonization of laws helps countries get closer together in terms of laws; (ii) resolves legal conflicts between countries; (iii) helps countries absorb and learn from each other in the legislative process to improve their own laws.

Harmonization of laws usually occurs at three levels: (i) harmonization of policies, (ii) harmonization of law-making processes, and (iii) regulation of common technical standards for drafting legal documents³⁸. In particular, legal harmonization must be ensured by appropriate institutions and mechanisms, and harmonization must have clear policy objectives. Harmonization can be easily established in certain areas, but is often not suitable for policy-sensitive areas where member states do not want to give up national control, such as public policy, public security, public health, environmental protection or other public interest objectives, of which labour law is a sensitive area.

2. Barriers to the harmonization of labour laws in ASEAN

Although the free movement of labour in ASEAN is an inevitable result of the regional integration process, especially the formation of the ASEAN Economic

³⁸ Hoang Phuoc Hiep, *25 years of Vietnam joining ASEAN - Implementation of membership obligations and prospects*, 12 *LAW JOURNAL* 2020.

Community (AEC). However, the free movement of labour in ASEAN is completely different from the EU, where member countries are not required to remove barriers to access the labour market, but ASEAN only focuses on the model of labour movement. The following details have shown the limitations of harmonization of laws among ASEAN countries, specifically in the field of labour:

First, the difference in institutional models: For the European Union (EU), the free movement of workers is the content of the free movement of persons (Free movement of persons) in addition to the free movement of establishment (Free movement of establishment)³⁹. To implement free movement of labour within the EU, member states must fulfill the obligation to eliminate direct and indirect discrimination based on nationality for workers from member states. EU – The free movement of goods, capital, labour and services formed the tenets of the European Economic Community in 1957, including the free movement (even then) of workers and job seekers between the six founding member states (Treaty of Rome, Articles 48–51).

Today, the EU has 28 members, whose citizens are entitled to equal treatment in terms of access to employment, working conditions and all other social and tax advantages. Those who have worked abroad for five consecutive years are also automatically entitled to immigration. The EU moves toward harmonization of labour provisions and policies, allowing “significant freedoms for member states in the field of social policy, while aiming to prevent what are considered to be the harmful effects of a “race to the bottom”⁴⁰. However, within the framework of ASEAN, free movement of labour does not mean that member states will fulfill the obligation to eliminate barriers to access to the labour market, but ASEAN only aims at a model of managed labour movement and makes it easier for workers to move within the regional. This is understandable because ASEAN countries have different levels of development, different expectations, and different legal systems. Comparing per capita income of Southeast Asian countries shows a huge gap in per capita income and a huge gap between rich and poor countries. The following infographic compares the GDP per capita of

³⁹ Bui Thi Ngoc Lan, *Free movement of labor in ASEAN: Advantages, limitations and some recommendations*, 6 *LAW JOURNAL* 2020.

⁴⁰ C. Barnard and S. Deakin, *Positive and Negative Harmonization of Labour Law in the European Union*, 8 *COLUMBIA JOURNAL OF EUROPEAN LAW* 389, (2002),

Southeast Asian countries in USD, with data from the International Monetary Fund (IMF) updated as of April 2024⁴¹.

Nation	Per capita income of Southeast Asian countries
Singapore	\$88.450
Brunei	\$35.110
Malaysia	\$13.310
Thailand	\$7.810
Indonesia	\$5.270
Viet Nam	\$4.620
Philippines	\$4.120
Cambodia	\$2.630
Laos	\$1.980
Timor-Leste	\$1.450
Myanmar	\$1.250

According to this measurement method, Singapore - a regional financial center, is the leading country in the region in terms of GDP per capita of 88,000 USD. In second place, Brunei has a large gap compared to Singapore with a GDP per capita of 35,110 USD (Brunei has a large source of income dependent on oil). Malaysia and Thailand (two countries dependent on the tourism industry), ranked third and fourth on this list with GDP per capita of 13,310 USD and 7,810 USD respectively. Thus, there is a huge gap between countries, the gap between the highest and lowest countries can be 70 times.

Regarding the legal systems of the 10 countries, each ASEAN country with its own characteristics in terms of history, tradition, geography, population composition, level of economic development, politics, religion, etc. has created diversity in society and legal systems for this region. Vietnam, Laos, Cambodia, Indonesia and the Philippines are countries influenced by the Civil law family; in contrast, Malaysia, Singapore, Brunei, Myanmar and the Philippines are

⁴¹<https://vneconomy.vn/so-sanh-gdp-binh-quan-dau-nguoi-cua-cac-nuoc-dong-nam-a.htm#:~:text=Theo%20%C4%91%C3%B3%20Singapore%20l%C3%A0%20qu%E1%BB%91c,nguy%C3%AAn%20thi%C3%AAn%20nh%C3%AAn%20h%E1%BA%A1n%20ch%E1%BA%BF>

influenced by the Common law family. In addition, Vietnam and Laos are also influenced by the socialist legal system, while Myanmar and Indonesia have also had certain elements of the socialist legal family in their development history⁴².

Second, the restriction on the free movement of labour within ASEAN only applies to business visitors, skilled workers and talents, collectively referred to as skilled workers. A series of documents such as the Agreement on the Free Movement of Natural Persons (MNP) in 2012, the AEC Blueprint 2015 and the AEC Blueprint 2015-2025 in 2015 continue to affirm that workers can move freely within the region, including skilled workers. In reality, migrant workers in ASEAN are often concentrated in the unskilled or semi-skilled labour segment. Most migrant workers in ASEAN countries are low-skilled or unskilled workers (unlike the Singapore market). They are also often illegal migrant workers, working in the informal sector or working in small businesses - places with little social security. Therefore, the majority of migrant workers are affected by their rights and are discriminated against in terms of social security.

Third, regarding the measures to implement the free movement of labour and the occupations that are allowed to move freely within ASEAN, there are still limitations and many procedures

In line with the approach to managed labour movement and creating more favorable conditions for labour movement within ASEAN. In the region, the measures to implement the free movement of labour within ASEAN include: signing Mutual Recognition Agreements (MRAs), signing the ASEAN Agreement on the Movement of Natural Persons (MNP) and joining the ASEAN Qualifications Reference Framework (ASEAN), the Qualifications Reference Framework - (AQRF). However, we can see that, despite the framework agreements, countries maintain their sovereignty in the field of labour and ASEAN is only a bridge to support the establishment of the initial mechanism. Approval to work in a country requires procedures and licensing review even though the parties have MRAs. MRAs have been signed but implementation is still difficult and procedural. For example, the MRA on engineering practice, states that professional engineers must be licensed to practice in a member country and must first meet 05 criteria, when submitting an application to the

⁴²<https://luatminhkhue.vn/tong-quan-ve-he-thong-phap-luat-cac-nuoc-asean.aspx>] while Indonesia and Brunei build their laws according to Islamic law.

National Supervisory Committee for review, must make an assessment and recommend the ASEAN Chartered Professional Engineer Coordinating Committee (ACPECC) to agree or disagree to grant a certificate of ASEAN Chartered Professional Engineer (ACPE) for the candidate. After being granted ACPE certification by ACPECC, professional engineers are not automatically allowed to practice in the member country but must apply for a license as a Registered Foreign Professional Engineer (REPE) by the competent authority of the host country and comply with the relevant regulations of that country. This is the decisive step for foreign engineers to practice. REPEs are not allowed to practice independently but must coordinate with engineers of the host country. In contrast, case-by-case assessment has been completely eliminated for the tourism industry, allowing automatic recognition of 32 tourism-related occupations⁴³.

Fourth, the number of MRAs is few. Currently, MRAs only focus on 8 professions: Architecture, Engineering Consulting, Nursing, Medical Practice, Dentistry, Tourism, Accounting and Auditing, and Surveying. Although there are many opportunities, the professions that ASEAN member countries have mutually recognized and allowed free movement account for only 1.5% of total employment in the ASEAN region, these jobs all require high vocational qualifications and skills⁴⁴.

The rights of migrant workers in ASEAN countries are also regulated differently in each country. This is reflected in the Constitution and labour laws of each country. Each country sets out conditions for migrant workers in terms of skills, qualifications, and work permits, and the duration of work permits⁴⁵. The labour restriction policies applied by some Southeast Asian countries show the political and public will of each country in the level of pursuing increased labour mobility.

While the MNP and ACIA⁴⁶ facilitate cross-border business activities, the implementation standards are not uniform across the region and do not increase

⁴³Labor Mobility in ASEAN: Current Commitments and Future Limitations - ASEAN Business News (aseanbriefing.com).

⁴⁴<https://www.vietnamplus.vn/aec-8-nghe-duoc-dich-chuyen-tu-do-chi-chiem-15-tong-so-viec-lam-post366168.vnp>.

⁴⁵According to the Vietnamese Labor Code, foreign workers must apply for a work permit and according to Decree 152/2020/ND-CP on the management of foreign workers.

⁴⁶ASEAN Comprehensive Investment Agreement.

the ability of employers to recruit skilled talent from other ASEAN member countries. In addition to the limited number of MRAs, taking advantage of an area that already has an MRA is often difficult in practice. In Cambodia, Thailand, Myanmar and Laos, companies must demonstrate that there will be a transfer of skills and knowledge to local employees and that foreign employees will eventually be replaced by locals. In Indonesia, companies must demonstrate that local employees cannot take on the position, and the Philippines even prohibits foreigners from participating in certain occupations under its Constitution. In Vietnam, labour laws also have some requirements for foreign workers to protect the domestic labour market. Jobs for foreign workers must demonstrate that they are experts, have technical qualifications and are licensed to work, except in some cases prescribed by legal documents⁴⁷. However, multinational companies can overcome many of these limitations by hiring employees from one country and then transferring them to another market⁴⁸.

Fifth, the absence of regional standards: The lack of effective labour mobility programmes is also a sign of the need for regional standards applicable to different sectors. Differences and fragmentation in policies and laws have led to ineffective cooperation. For example, the ASEAN aviation industry does not have regulations on licensing of training personnel, safety and maintenance, flight operations and air traffic management. Establishing common guidelines for industries across ASEAN could facilitate the development of businesses and industries in the region, build a larger and more skilled workforce and promote connectivity.

In addition, the fact that ASEAN countries have not signed the fundamental ILO conventions, including and most importantly the International Convention on the Rights of All Migrant Workers and Members of Their Families (1990 Convention), has also led to difficulties in harmonizing laws within ASEAN.

In the system of international documents on migrant labour, the International Convention on the Rights of All Migrant Workers and Members of Their Families is considered one of the most important treaties, but only 3 sending countries in ASEAN have joined it, such as Cambodia, the Philippines, and

⁴⁷ Articles 150-157, VIETNAMESE LABOR CODE 2019.

⁴⁸ *Labor Mobility in ASEAN: Current Commitments and Future Limitations* - ASEAN BUSINESS NEWS (aseanbriefing.com).

Indonesia (3/10), while most other countries in the region have not joined it (7/10). It is understandable because this Convention imposes many responsibilities, especially economic and social ones, on labour receiving countries, causing these countries to hesitate. Therefore, no country in North America and Europe (developed countries and migrant labour receiving countries) has signed and joined this convention, including some developed countries/territories in Asia that have joined this Convention, such as Korea, Taiwan, Singapore, and Malaysia.

V. Measures to promote harmonization of labour laws to protect the rights of migrant workers

Although ASEAN's legal integration has made new progress, it is considered ineffective because the harmonization of laws in ASEAN must be based on the institutional foundation of the ASEAN Charter and on ASEAN's basic principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity. These are factors that need to be considered in the process of harmonizing ASEAN laws. ASEAN has made many efforts in the voluntary harmonization of laws through the Working Group on the Harmonization of International Trade Laws of ASEAN. Below are some proposals based on the consideration of diversity, socio-economic conditions and characteristics of ASEAN countries:

1. All ASEAN member countries need to identify a cooperation model and have a common framework for policy cooperation. This refers to the structured approach or method that ASEAN members agree to follow in their cooperation efforts. It outlines how the countries will work together, share responsibilities and achieve common goals. This model can include various aspects such as economic integration, political cooperation, socio-cultural exchange and security cooperation.

All ASEAN countries aim to harmonize their law-making processes, develop monitoring mechanisms, and resolve conflicts and handle violations in the region. This aspect highlights the comprehensive approach that ASEAN countries are taking to enhance regional cooperation. By harmonizing law-making processes, they aim to create a more integrated and effective regional. Developing monitoring and conflict resolution mechanisms ensures that policies are followed and

disputes are resolved amicably, maintaining stability and trust. Addressing violations in the region underscores the commitment to upholding regional agreements and norms, ensuring fairness and the rule of law across the region. Together, these steps contribute to building a more cohesive, stable and prosperous ASEAN.

2. Substantial implementation of the CEBU Plans and Declaration on Migrant Workers. The CEBU Declaration calls on both sending and receiving countries to promote “the full potential and dignity of migrant workers in an atmosphere of freedom, equality and stability” in accordance with their domestic laws (Article 1). However, the Declaration is not legally binding and is only a recommendation to Member States. Even the Memorandums of Understanding between ASEAN countries are not legally binding⁴⁹. Therefore, the goals in the AEC Blueprint need to be specified into commitments in the MNP Agreement to be legally binding, creating a basis for applying ASEAN's dispute settlement mechanism in case of violations.
3. Increase the number of MRAs. The harmonization of labour laws in ASEAN has had initial policy intentions, but there is a lack of effective organizational and enforcement mechanisms. This stems from the fact that ASEAN countries lack legally binding agreements. The content and number of MRAs are not detailed and complete enough to promote labour integration. Despite many common points and common visions, efforts to harmonize laws face many obstacles. Each ASEAN country with its own characteristics in terms of history, tradition, geography, population composition, level of economic development, politics, religion... is the foundation for creating diversity in society and legal systems for this region⁵⁰. Therefore, in the coming time, member countries should clearly identify areas that need cooperation and expansion. In the field of migrant workers, it is necessary to continue negotiations, make further commitments in areas that have framework

⁴⁹ Testaverde, *supra* note 8 at 5.

⁵⁰ Hoang Le Khanh Linh , *Overview of the legal systems of ASEAN countries* MINH KHUE <https://luatminhkhue.vn/tong-quan-ve-he-thong-phap-luat-cac-nuoc-asean.aspx>

agreements and simplify procedures and mutual recognition steps in areas that have specific implementation guidelines. The objectives set out in the ASEAN Declaration on the Rights of Migrant Workers should be translated into specific binding commitments or promote ASEAN countries to sign and ratify the United Nations international conventions on labour standards for migrant workers and some common conventions, based on the socio-economic situation and political institutions of each country. All ASEAN member countries should negotiate to enhance common skills training programs and mutual recognition.

4. It is necessary to establish an ASEAN qualifications framework to create a universal measure of qualifications and harmonize regulations, while encouraging universities to cooperate and develop common standards. The need to enhance the mobility of skilled labour for existing MRAs in addition to expanding MRAs in other sectors. In addition, strengthening the labour inspection mechanism and enhancing cooperation between government, business and civil society are necessary steps in this regard⁵¹.

VI. Conclusion

Foretasted analysis outlines the significance of effectively incorporating and promoting labour mobility in the ASEAN region. It delves into the advantages and obstacles of the integration process and the encouragement of labour movement within the ASEAN. It underscores the divergence in adhering to the basic labour conventions of the International Labour Organization (ILO), explores the potential for harmonizing labour laws, and shines a light on the challenges in doing so. Furthermore, it offers feasible measures for member countries to standardize labour laws, establish a robust policy framework at the regional level, and enhance the safeguarding of migrant workers' rights within the ASEAN region.

⁵¹Mely Caballero-Anthony, Paul Teng and Belinda Chng S. Rajaratnam School of International Studies, *ASEAN Economic Community (AEC) 2015: Opportunities and challenges for food security* (2013).